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TANJUNG TIARA SDN BHD

v.

SOUTHWIND DEVELOPMENT SDN BHD

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COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
SYED AHMAD HELMY JCA
MOHAMED APANDI ALI JCA
[CIVIL APPEAL NO: Q-03-102-08]

C

20 OCTOBER 2010

CONTRACT: *Breach - Damages - Claim for loss of profits - Claim based on estimated loss of profits - Principles applicable - Whether damages recoverable*

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Pursuant to a contract between the plaintiff and the defendant, the plaintiff was given the right to develop the defendant's agricultural land into an oil palm estate. On the defendant's repudiation, the plaintiff sued the defendant for repudiation and breach of contract. The trial court found the defendant liable and ordered it to pay damages to be assessed by the registrar. At the assessment proceedings, the plaintiff led evidence to establish its estimated loss of profits as 25% of the contract value. For the defendant, it was revealed that it had used the plaintiff's method of reckoning profits in another contract with a third party and had derived an estimate of profits at 33.27% of the contract value. The registrar awarded the plaintiff nominal damages of RM10. On appeal by the plaintiff, the judge set aside the nominal damages and substituted it with a sum of RM6,747,613.43 representing profits based on 25% of the contract value of RM26,990,453.72. The defendant thus appealed to the Court of Appeal.

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Held (dismissing the appeal with costs)
Per Low Hop Bing JCA:

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(1) The defendant's repudiation and breach of contract was in relation to the plaintiff's right to develop 4,856ha of agricultural land into an oil palm plantation and the plaintiff was entitled to payment pursuant to the Schedule of Progress Payments incorporated therein. The assessment of damages being an exercise of discretion must be determined on the basis of the facts and circumstances established in each particular case. (para 12)

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(2) The plaintiff's claim for damages was supported by the estimate and the consequential computation of 25% of the contract value. There was no challenge to this computation on cross-examination. The computation was supported by the defendant's own computation in its third party contract wherein it arrived at an estimated profit of 33.27% of the third party contract value. (para 21)

(3) The trial judge had accepted the evidence for the plaintiff on its computation of loss of profit, which amount he awarded to the plaintiff. The judge's award was primarily based on his finding of facts having regard to the evidence adduced at the proceedings for assessment of damages. There was no appealable error in his award of damages. (para 22-25)

Bahasa Malaysia *Translation Of Headnotes*

Menurut satu kontrak di antara plaintif dan defendan, plaintif telah diberi hak untuk memajukan tanah pertanian defendan kepada sebuah estet kelapa sawit. Berasaskan penolakan defendan, plaintif menyaman defendan untuk penolakan dan pelanggaran kontrak. Mahkamah perbicaraan mendapati defendan bertanggungjawab dan mengarahkannya membayar gantirugi yang akan ditaksirkan oleh pendaftar. Di prosiding pentaksiran, plaintif mengemukakan keterangan untuk menetapkan kehilangan keuntungan yang dianggarkan sebagai 25% nilai kontrak. Bagi defendan, ia telah didedahkan bahawa ia telah menggunakan cara pengiraan keuntungan plaintif dalam kontrak lain dengan pihak ketiga dan telah mendapat suatu anggaran keuntungan pada 33.27% nilai kontrak. Pendaftar mengaward plaintif gantirugi nominal sebanyak RM10. Atas rayuan oleh plaintif, hakim mengenepikan gantirugi nominal dan menggantikannya dengan jumlah sebanyak RM6,747,613.43 merupakan keuntungan berdasarkan nilai kontrak RM26,990,453.72. Defendan oleh itu merayu ke Mahkamah Rayuan.

Diputuskan (menolak rayuan dengan kos)
Oleh Low Hop Bing HMR:

(1) Penolakan dan pelanggaran kontrak defendan berhubungan dengan hak plaintif untuk memajukan 4,856ha tanah pertanian kepada sesuatu ladang kelapa sawit dan plaintif berhak mendapat bayaran mengikut Jadual Bayaran Kemajuan yang digabungkan dalamnya. Pentaksiran gantirugi yang merupakan suatu pelaksanaan budibicara mesti ditentukan berdasarkan fakta-fakta dan keadaan-keadaan yang ditetapkan dalam setiap kes.

(2) Tuntutan plaintif bagi gantirugi disokong oleh anggaran dan pengiraan berikutnya 25% nilai kontrak. Tiada cabaran terhadap pengiraan ini pada masa pemeriksaan balas. Pengiraan tersebut disokong oleh pengiraan sendiri defendan dalam kontrak pihak ketiganya di mana ia mencapai sesuatu anggaran keuntungan sebanyak 33.27% nilai kontrak pihak ketiga.

(3) Hakim perbicaraan telah menerima keterangan untuk plaintif atas pengiraannya untuk kehilangan keuntungan, yang amaunnya beliau mengawardkan kepada plaintif. Award hakim terutamanya berdasarkan dapatan fakta beliau berhubungan dengan keterangan yang dikemukakan di prosiding pentaksiran gantirugi. Tidak ada kesilapan yang boleh dirayu terhadap dalam award gantirugi beliau.

Case(s) referred to:

Amar Singh v. Chin Kiew [1960] 1 LNS 5 ***(refd)***

Ban Chuan Trading Co Sdn Bhd & Ors v. Ng Bak Guan [2003] 4 CLJ 785 CA ***(refd)***

Bank Utama (Malaysia) Berhad v Insan Budi Sdn Bhd [2009] 1 CLJ 221 ***(refd)***

Blue Sea Pools Swimming Centre (Klang) Sdn Bhd v. Loo Ah Chew & Sons Sdn Bhd [2003] 1 LNS 121 HC ***(refd)***

Guan Soon Tin Mining Company v. Wong Fook Kum [1968] 1 LNS 43 FC ***(refd)***

Industrial & Agricultural Distribution Sdn Bhd v. Golden Sands Construction Sdn Bhd [1993] 1 LNS 96 HC ***(refd)***

Kokomewah Sdn Bhd v. Desa Hatchery Sdn Bhd [1995] 3 CLJ 511 CA ***(refd)***

Letrik Bandar Hup Heng Sdn Bhd v. Wong Sai Hong [2002] 5 CLJ 170 HC ***(refd)***

Malaysian Rubber Development Corporation Berhad v. Glove Seal Bhd [1994] 4 CLJ 783 SC ***(refd)***

Mallett v. McMongale [1970] AC 166 ***(refd)***

Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***

Sime UEP Properties Bhd v. Woon Nyoke Lin [2002] 3 CLJ 719 CA ***(refd)***

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***

For the appellant - Tan Thiam Teck (KY Lim & Joyce Chan with him); M/s Kadir, Wong, Lin & Co

For the respondent - Mohamad Ivan Hussein; M/s Ivan Hussein Advocates

[Appeal from High Court, Miri; Summons Suit No: MR 28-1995]

Reported by Andrew Christopher Simon

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] This appeal lodged by the appellant ("the defendant") is directed against the award of damages in the sum of RM6,747,613.43 handed down by the learned High Court judge in favour of the respondent ("the plaintiff"). The issue of liability for repudiation and breach of contract is not before us.

[2] On 20 October 2010, we heard and dismissed the appeal. At the request of defendant's learned counsel, we now give our grounds.

Factual Background

[3] In essence, the plaintiff had sued the defendant for repudiation and breach of contract. Pursuant to the contract, the plaintiff was given the right to develop the defendant's land measuring 4,856 ha (= 12,000 ac) into an oil palm plantation ("the contract").

[4] On 2 April 1997, the learned trial judge found the defendant liable for repudiation and breach of the contract, and ordered damages to be assessed by the learned registrar. Upon assessment, the learned registrar awarded nominal damages of RM10 to the plaintiff.

[5] At the proceedings for assessment before the learned registrar, the plaintiff called PW1 as a witness. PW1's testimony is to the effect that:

(1) The contract value is RM26,990,453.73; and

(2) The plaintiff's estimate in terms of loss of profit is RM6,747,613.43 being 25% of the contract value of RM26,990,453.73.

[6] When PW1 was cross-examined by defendant's learned counsel, the profit based on 25% of the contract value of RM26,990,453.73 was not challenged.

[7] On the other hand, the defendant through DW1 adduced evidence, in essence, that:

(1) The defendant in another agreement ("the Golden Hope agreement") performed by a third party in another oil palm plantation had adopted the same method used by plaintiff;

(2) The contract value in the Golden Hope agreement was RM2,726,669.70 and the contract area was 736 hectares; and

(3) Using the rates in the Golden Hope agreement, the defendant's estimate in terms of profit was 33.27% of the contract value.

[8] On the above evidence, the learned judge set aside the nominal damages awarded by the learned registrar and substituted it with the sum of RM6,747,613.43, representing the profit based on 25% of the contract value of RM26,990,453.72.

Is The Judge's Award Correct?

[9] It was contended by learned counsel Mr Tan Thiam Teck for the defendant that:

(1) the said sum of RM6,747,613.43 is "just an estimate", and not the actual loss; and

(2) the plaintiff is entitled to nominal damages only.

[10] He cited the following authorities:

(1) *Guan Soon Tin Mining Company v. Wong Fook Kum* [1968] 1 LNS 43 (FC);

(2) *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15 (FC);

(3) *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; [1989] 3 MLJ 360 (HC);

(4) *Sime UEP Properties Bhd v. Woon Nyoke Lin* [2002] 3 CLJ 719 CA;

(5) *Blue Sea Pools Swimming Centre (Klang) Sdn Bhd v. Loo Ah Chew & Sons Sdn Bhd* [2003] 1 LNS 121;

(6) *Ban Chuan Trading Co Sdn Bhd & Ors v. Ng Bak Guan* [2003] 4 CLJ 785 CA;

(7) *Kokomewah Sdn Bhd v. Desa Hatchery Sdn Bhd* [1995] 3 CLJ 511 CA;

(8) *Letrik Bandar Hup Heng Sdn Bhd v. Wong Sai Hong* [2002] 5 CLJ 170 HC; A

(9) *Industrial & Agricultural Distribution Sdn Bhd v. Golden Sands Construction Sdn Bhd* [1993] 1 LNS 96 HC; and

(10) *Malaysian Rubber Development Corporation Berhad v. Glove Seal Sdn Bhd* [1994] 4 CLJ 783 SC. B

[11] Mr Mohd Ivan bin Hussein stressed for the plaintiff that the learned High Court judge had correctly awarded the damages on the basis of the plaintiff's computation in relation to the loss of profit. C

[12] In our judgment, it must be immediately emphasised that the defendant's repudiation and breach of contract was in relation to the plaintiff's right to develop 4,856 ha (= 12,000 ac) of agricultural land into an oil palm plantation, and the plaintiff as Contractor was D entitled to payment pursuant to the Schedule of Progress Payments incorporated therein. The assessment of damages being an exercise of discretion must be determined on the basis of the facts and circumstances established in each particular case. That being the position, the authorities cited for the defendant would only be useful E if they relate to repudiation and breach of a similar type of contract ie, to develop a relatively huge area of agricultural land into an oil palm plantation.

[13] With this perspective in mind, we now proceed to examine F the authorities on which the defendant relied. The issues discussed in these authorities revolve around the following:

(1) Action based on negligence;

(2) No evidence of damages; G

(3) Different type of contract;

(4) No valid contract; and

(5) Damages based on an estimate. H

[14] We shall now embark on an analysis of the above issues.

[15] Action Based On Negligence

(1) In *Guan Soon Tin Mining Co, supra*, the claim was based on the I appellant's negligence in causing pollution of a fish pond by discharging tailings thereto. The plaintiff had failed to establish

A the defendant's liability. The Federal Court through the judgment of Ong Hock Thye FJ (later CJ(M)) awarded no damages.

(2) In our respectful view, this authority is irrelevant to the B defendant's contention. It had nothing to do with repudiation and breach of contract.

[16] No Evidence Of Damages

(1) In *Popular Industries Limited, supra,* the plaintiff claimed damages C for non-delivery of goods and alleged loss of profit on resale. At p. 360D rt, Edgar Joseph Jr J (later FCJ) found that the plaintiff had adduced no evidence or no sufficient evidence as to the amount and so it was virtually impossible to assess the damages.

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(2) In *Blue Sea Pools Swimming Centre (Klang) Sdn Bhd, supra*, the plaintiff sought damages in the sum of RM2,610,000 for loss of profit, not from the development of agricultural land into an oil palm plantation, but from projected membership in the E swimming centre for five years. Sitting in the Shah Alam High Court, I held that, in the absence of supporting evidence, this was the plaintiff's projection to achieve the said profit which had not taken into account the operation and management costs in relation to the swimming centre. I disallowed this item as it was F mere speculation, conjecture or projection.

(3) In *Ban Chuan Trading Co Sdn Bhd, supra,* the appellant and the respondent entered into a tenancy agreement ("T/A") for the rental of property ("the premises"). The appellant, having failed to deliver vacant possession of the premises, admitted liability. G The respondent sought damages arising from the loss allegedly suffered by the respondent on the basis of an increase by 20% of the respondent's business upon moving to the premises. The Court of Appeal held that this mere assertion was not supported by evidence. H

(4) In *Industrial & Agricultural Distribution Sdn Bhd, supra,* the defendant purchased two units of excavators from the plaintiff. After two months, the defendant requested the plaintiff to take back the excavators, on the ground that they were not suitable I for the purpose for which they were bought. The plaintiff sued

the defendant for depreciation in the value of the excavators. As there was no proof of any actual depreciation, the High Court merely awarded nominal damages.

(5) In *Letrik Bandar Hup Heng Sdn Bhd, supra,* there was a breach of contract for electrical works. However, the respondent's claim for damages was not proved. The respondent was awarded nominal damages of RM10.

[17] The above authorities are not helpful to the defendant herein. In each of them, there was no evidence to support the award of damages. However, in the instant appeal, evidence relating to the loss of profit has been adduced for the parties.

[18] Different Type Of Contract

(1) In *Malaysian Rubber Development Corp Sdn Bhd, supra*, the agreement was for the supply by the plaintiff to the first defendant of two million rubber gloves per month at a total price of US1.8 million. In breach of the agreement, the defendant failed to issue an irrevocable letter of credit in favour of the plaintiff. In assessing damages, the High Court awarded the plaintiff, *inter alia*, RM3.1 million for loss of profits based on the proposition that, as there was no available market for the gloves, the measure of damages was the difference between the contract price and the price at which the gloves were eventually sold, and not the difference between the contract price and manufacture cost since the plaintiff was only obliged to supply the gloves and not manufacture them. On appeal, the (then) Supreme Court held that the proper measure of damages was the difference between the contract price and production costs.

(2) The above facts reveal a different type of contract, and are clearly distinguishable from those in the instant appeal. Hence, no assistance may be derived therefrom.

[19] No Valid Contract

(1) In *Sime UEP Properties Bhd, supra*, no valid contract existed between the appellant and the respondent, less so any breach thereof.

(2) In *Kokomewah Sdn Bhd, supra*, the High Court held that there was no concluded contract based on the letter of intent and so there was no question of any award of damages. In relation to another contract ie, the contract for construction works ie, the May 1984 contract, the Court of Appeal held that the May 1984 contract had been properly terminated due to the appellant's default. As the termination of the May 1984 contract was justified, the question of assessment of damages did not exist. (see [1995] 3 CLJ 511 CA).

(3) Upon our analysis of the above authorities cited for the defendant, we are unable to find any support for the defendant's contention.

Estimate

[20] This was considered in *Tan Sri Khoo Teck Puat, supra*, which we shall now examine in the context of the instant appeal.

[21] We are of the view that the plaintiff's claim for damages was supported by the estimate and the consequential computation of 25% of the contract value for the development of the agricultural land into an oil palm plantation in accordance with the contract. In the course of the defendant's cross-examination of the plaintiff's witness (PW1), there was no challenge on the 25% profit. There was no resistance by the defendant that the plaintiff's figure was unrealistic or unreasonable. On the contrary, this computation was supported by the defendant's own computation pursuant to the Golden Hope agreement which actually arrived at the estimated profit of 33.27% of the contract value.

[22] The learned trial judge had accepted the evidence adduced for the plaintiff, in particular the computation arrived at by PW1 ie, the loss of profit of RM6,747,613.43 which was awarded to the plaintiff. In doing so, the learned judge referred to *Tan Sri Khoo Teck Puat, supra*, and rejected the defendant's contention that damages could not be based on estimate.

[23] The above contention relating to estimate was canvassed before us. In *Tan Sri Khoo Teck Puat, supra*, the transaction was for the sale and purchase of land in Johor Bahru at the consideration of RM48 million for the purpose of development. The purchaser paid some RM4.8 million as deposit but failed to pay the balance purchase price. The second appellant terminated the sale agreement

and forfeited the deposit. The High Court ordered specific performance of the agreement with damages to be assessed. The assessment of damages led to an award, *inter alia*, of RM13.5m for loss of profits. On appeal, the (then), Supreme Court held that the judge's basis of assessment could not be supported in law. Be that as it may, at p. 26, Edgar Joseph Jr FCJ (as he then was) applied the *dicta* of Lord Diplock in *Mallett v. McMongale* [1970] AC 166, at p. 176 and held, *inter alia*, that the correct approach for the judge to have adopted when assessing damages, which depends upon a view of what will happen in the future, is that the court must make an estimate of what are the chances that a particular thing will happen, and whether they are more or less than even.

[24] In the instant appeal, the plaintiff's computation is not merely based on an estimate of the loss of profit. Such estimate was indeed supported by the defendant's own evidence. The estimate of 25% is actually lower than the 33.27% arrived at by the defendant.

[25] The award of damages by the learned trial judge is primarily based on his finding of facts, having regard to the evidence adduced at the proceedings for assessment of damages. The appeal from the learned registrar to him as judge in chambers is by way of rehearing. We see no appealable error in the learned judge's award of damages. Hence it does not justify any appellate interference.

[26] In *Amar Singh v. Chin Kiew* [1960] 1 LNS 5, Thomson CJ stated succinctly as follows:

> The fixation of damage is so largely a matter of opinion or of impression that differences of calculation or assessment are to be expected. It is, to some extent, an exercise of judicial discretion. The Court of Appeal will not therefore give preference to their own figure simply because they disagree with the figure arrived at by the trial judge; they will only interfere if they are satisfied that the judge has acted on a wrong principle of law or has misapprehended the facts, or has, for those or other reasons made a wholly erroneous estimate of the damage suffered.

[27] A similar sentiment was shown by this court in *Bank Utama (Malaysia) Berhad v. Insan Budi Sdn Bhd* [2009] 1 CLJ 221, in the following passage:

A [88] It is trite that an appellate court will not ordinarily interfere with the findings and award of the trial court unless the following are shown: (i) that the award or findings were clearly wrong or erroneous; taking into account irrelevant matters and not considering relevant matters; (ii) that the findings were clearly wrong in law and principle. (per Hasan Lah JCA)

B

Conclusion

[28] On the foregoing grounds, we found no merit in this appeal which we dismissed with costs of RM30,000. The decision of the C learned judge of the High Court was affirmed. Deposit to the plaintiff (respondent) on account of the fixed costs.

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